No. 695

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Supreme Court of the United States

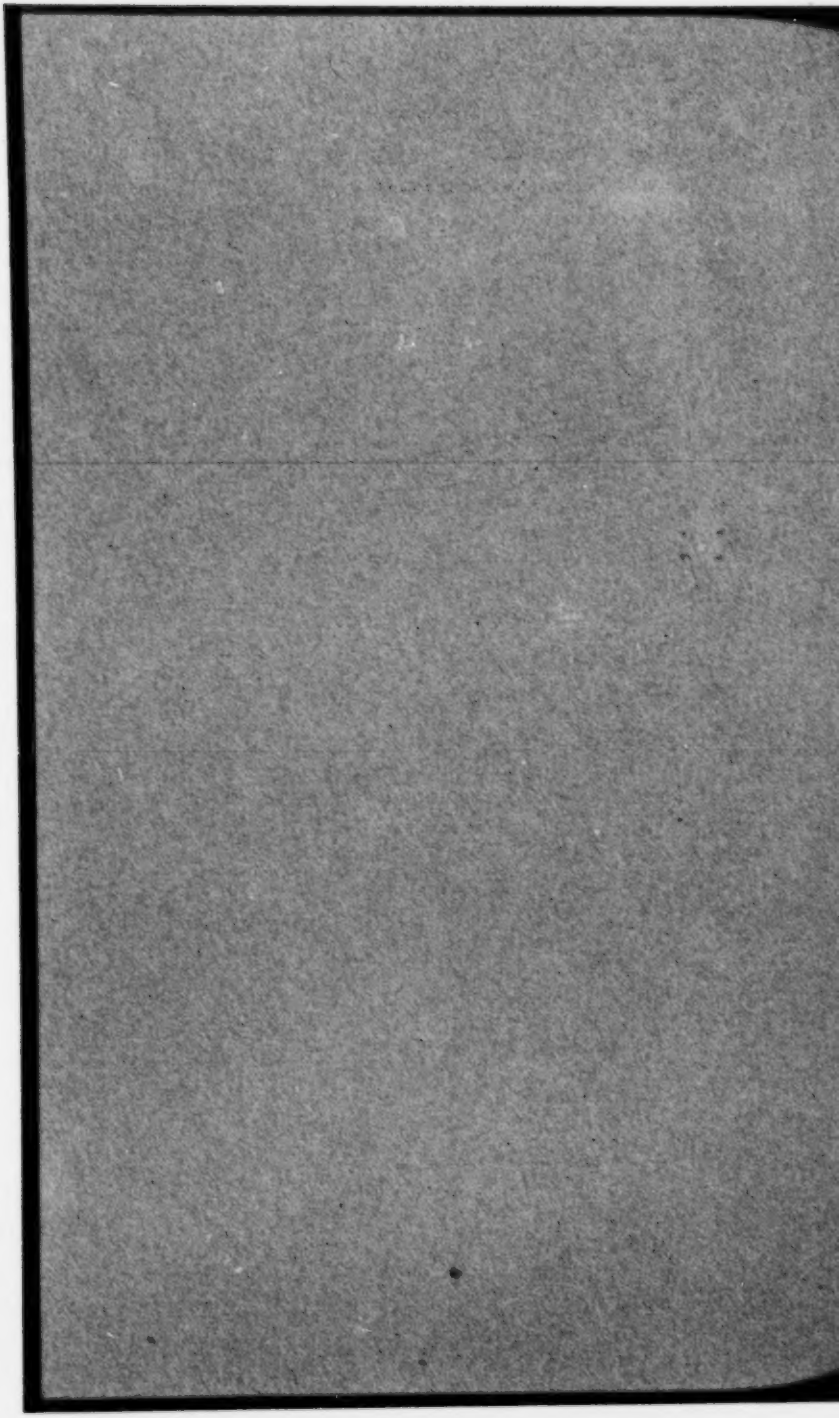
October Term, 1947

ROY D. KREBS,
as Receiver of Central Mutual Insurance Company
of Chicago, an Illinois corporation,
Petitioner,

vs.

CHARLES J. ROGERS, INC.,
a Michigan corporation,
Respondent.

PETITION AND WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.



INDEX

PAGE NO.

Petition for Writ of Certiorari:

Summary Statement of the Matter Involved 2

Jurisdictional Statement 5

The Questions Presented 9

The Reasons Relied On for the Allowance of the Writ 10

Brief in Support of Petition for Certiorari:

The Opinion Below 14

Jurisdiction 14

The Questions Involved 14

Assignments of Error 15

Argument 18-62

A. Respondent is bound by the Illinois proceedings although not a party thereto or notified thereof 18-33

B. The Illinois Assessment against Respondent is entitled to Full Faith and Credit in the Courts of Michigan 33-40

C. 1. The one-year proviso of the Michigan Mutual Insurance Code is not a statute of limitations, does not apply to foreign insurance companies in liquidation and cannot constitutionally be applied to them 40-54

2. The doctrine of comity is irrelevant; no question of the public policy of Michigan is or could be involved 55-57

D. Petitioner is suing upon a judgment, not upon a contract, and the liability involved is statutory, not contractual 58-59

E. Michigan members of the Company should not be excepted from the obligation to pay assessments which the Courts have enforced against the members in other states 60

Conclusion 61-62

Appendix 63-65

AUTHORITIES CITED

TABLE OF CASES

	Page No.
Adam v. Saenger, 303 U. S. 59	19
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389	7, 45, 62
Andrews v. Bacon, 38 Fed. 777	26
Baltic Mining Co. v. Massachusetts, 231 U. S. 68	51
Barbour v. Thomas, 86 Fed. (2nd) 510	26
Beha v. Weinstock, 247 N. Y. 221	33, 43, 44
Bernheimer v. Converse, 206 U. S. 516	7, 21, 22, 24, 35, 46
Bradford Electric Light Co. v. Clapper, 286 U. S. 145	50
Broderick v. Rosner, 294 U. S. 629	7, 23, 35, 37, 50, 51, 62
Campbell v. Holt, 115 U. S. 620	49
Casey v. Galli, 94 U. S. 673	26
Central Mutual Auto Ins. Co. v. Commissioner, 292 Mich. 309	43
Chandler v. Peketz, 297 U. S. 609	8, 21, 22, 35
Christmas v. Russell, 5 Wall. 290	7, 34, 37, 38, 39, 56
Christopher v. Brusselback, 302 U. S. 500	8, 20, 21, 22
Commonwealth v. Keystone Indemnity Exchange, 335 Pa. 333	28
Converse v. Hamilton, 224 U. S. 243	7, 22, 23, 24, 35
Cooper v. Reynolds, 10 Wall. 308	19
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	45
Davidson v. New Orleans, 96 U. S. 97	45
Davis v. Davis, 305 U. S. 32	8, 37, 38
Fauntleroy v. Lum, 210 U. S. 230	7, 19, 35, 37, 38, 39, 56, 57
Ferris v. American Insurance Union, 245 Mich. 548	27
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426	51
Gaston v. Keehn (Ga.), 26 S. E. (2nd) 107	60
Glenn v. Liggett, 135 U. S. 533	26, 47
Glenn v. Marbury, 145 U. S. 499	48
Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287	19
Guaranty Trust Co. v. York, 89 Law Ed. 1418	49
Hampton v. McConnell, 3 Wheat. 234	7, 34, 37, 38
Hansberry v. Lee, 311 U. S. 32	8, 20
Hartford Life Ins. Co. v. Barber, 245 U. S. 146	20
Hartford Life Insurance Co. v. Ibs, 237 U. S. 662	20
Hawkins v. Glenn, 131 U. S. 319	26, 46
Howarth v. Lombard, 175 Mass. 570	26
In Re Auto Mutual Indemnity Co., 14 N. Y. Supp. (2) 601	45
Jackson v. Citizens' Casualty Co., 252 N. Y. App. Div. 393	59
John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178	8, 50
Keehn v. Hodge Drive-It-Yourself, Inc., 146 Ohio St. 45	12, 33
Keehn v. Parrish Dray Line, 145 Fed. (2nd) 646	60
Kelch v. Keehn (Md.), 36 Atl. (2) 544	49
Kennedy v. Gibson, 8 Wall. 498	26
Kenney v. Supreme Lodge, 252 U. S. 411	7, 35, 37, 38, 39
Koshkonong v. Burton, 104 U. S. 668	48
Ludwig v. Stewart, 32 Mich. 27	48
Magnolia Petroleum Co. v. Hunt, 320 U. S. 430	8, 34, 36, 38, 62

	Page No.
Marin v. Augedahl, 247 U. S. 142	7, 21, 22, 35
McElmoyle v. Cohen, 13 Pet. 312	31
Miller v. Barnwell Bros., 137 Fed. (2nd) 257	60
Milliken v. Meyer, 311 U. S. 457	8, 19
Milwaukee County v. White Co., 296 U. S. 268	8, 35, 38, 56
Modern Woodmen of America v. Mixer, 267 U. S. 544	6, 7, 28, 35, 51, 61
Murray's Lessees v. Hoboken Land Co., 18 How. 272	45
Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170	27, 62
Parker v. Brown, 317 U. S. 341, 362	54
Pennoyer v. Neff, 95 U. S. 714	20
People ex rel. Palmer v. Central Mutual Ins. Co. of Chicago, 313 Ill. App. 84	3, 18, 29, 30, 42, 60
Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201	8, 21, 36, 56, 62
Platt v. Wilmot, 193 U. S. 602	58
Roche v. McDonald, 275 U. S. 449	7, 19, 34, 39
Royal Arcanum v. Green, 237 U. S. 531	6, 20, 35
Selig v. Hamilton, 234 U. S. 652	7, 24, 35
Smith v. Swormstedt, 16 How. 288	20, 21
Southwestern Telegraph & Telephone Co. v. Danaher, 238 U. S. 482	45
Sovereign Camp v. Bolin, 305 U. S. 66	6, 8, 35, 59, 62
Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356	20
Swing v. American Glucose Co., 123 Ill. App. 156	29
Taggart v. Wachter, 179 Md. 608	28
Terral v. Burke Construction Co., 257 U. S. 529	51
Titus v. Wallick, 306 U. S. 282	8, 19, 35, 37, 38, 39, 50, 56, 57, 61
U. S. v. South-Eastern Underwriters Association, 322 U. S. 533	53, 54
Ward & Gow v. Krinsky, 259 U. S. 503	45
Wheeler v. Jackson, 137 U. S. 245	48
Whitney v. California, 274 U. S. 357	45
Williams v. North Carolina, 89 Law Ed. 1123	8, 55, 62
Williams v. North Carolina, 317 U. S. 287	8, 36, 38, 39

STATUTES AND CONSTITUTIONAL PROVISIONS

	Page No.
Constitution of the United States, Amendment XIV, Sec. 1	5, 11, 45
Constitution of the United States, Article I, Sec. 10	5, 11
Constitution of the United States, Article IV, Sec. 1	4, 5, 9, 14, 36, 37
Constitution of the United States, Article I, Sec. 8, Cl. 3	11-12, 17, 53-54
Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. C. 344	5, 7, 14
Act of May 26, 1790, c. 11, 28 U. S. C. 687	5, 10, 36, 38
Revised Statutes of Illinois (State Bar Assn. Ed. 1935) Ch. 73, Sec. 287, et seq.	2, 29-30
Revised Statutes of Illinois (State Bar Ass'n Ed. 1937), Ch. 73, Secs. 819 and 833	29-30
Revised Statutes of Illinois (State Bar Ass'n Ed. 1937), Ch. 83, Sec. 17	4
Compiled Laws of Michigan of 1929, Secs. 12654-12671	41
Compiled Laws of Michigan of 1929, Sec. 12660	4, 9, 14, 40
Compiled Laws of Michigan of 1929, Sec. 13531	6
Compiled Laws of Michigan of 1929, Sec. 13976	4, 41

TEXT BOOKS, ETC.

Ames, J. B., Lectures on Legal History	49
Henderson, The Position of the Foreign Corporation in Constitutional Law	51
Holmes, Hon. Oliver Wendell, Collected Legal Papers	61
Jackson, Hon. Robert H., Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. Law Rev. 1	34, 55
Willoughby, W. W., The Constitutional Law of the United States (2nd Ed.)	57

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

ROY D. KEEHN,
as Receiver of Central Mutual Insurance Company
of Chicago, an Illinois corporation,
PETITIONER,

VS.

CHARLES J. ROGERS, INC.,
a Michigan corporation,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

(Figures in parentheses refer to pages of the printed record, except as the context indicates otherwise.)

To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Roy D. Keehn, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation, respectfully represents that:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case presents the question of the right of a state, under the guise of merely regulating procedure, to nullify statutory obligations voluntarily assumed by its citizens as members of a corporation chartered in another state. The Supreme Court of Michigan, in an opinion filed and judgment entered on May 14, 1945 (rehearing denied October 8, 1945), has asserted this right; it has denied Full Faith and Credit to the public acts, records and judicial proceedings of the State of Illinois, and, in annihilating the substantive rights conferred upon Petitioner by the law of Illinois, has deprived Petitioner of his property without due process of law and has impaired the obligation of a statute-imposed contract between Respondent and an Illinois corporation.

The facts are simple and not in dispute. The Respondent corporation was and is admittedly a member of Central Mutual Insurance Company of Chicago by virtue of its acceptance of a policy of insurance in said Insurance Company (5). As required by the law of Illinois (Revised Stats. of Ill., State Bar Assn. Ed. 1935, Chapter 73, Sec. 287 et seq.), and by the By-Laws of the Company, the policy contained the following provision:

> "The contingent liability of the assured hereunder is limited to one time the premium named herein and no more. The assured is hereby given and accepts notice that by virtue of this policy he is a member of the Central Mutual Insurance Co. of Chicago" (3).

The policy which was issued for a term of one year, commencing on April 24, 1936, and ending on April 24, 1937, was cancelled by mutual consent on October 10, 1936 (4, 6). Central Mutual Insurance Company became in-

solvent and was taken over for liquidation by the Illinois Insurance authorities early in 1937. After extended litigation, in the Circuit Court of Cook County, Illinois, on March 19, 1940, an assessment of one time the cash premium was levied against all holders of policies in the Company who had held a policy at any time from January 31, 1935, to January 11, 1937, inclusive, and the Receiver was authorized to collect the same by suit, if necessary, or otherwise (9-12). An appeal was perfected from said order to the Appellate Court of Illinois, First District, which Court, on January 22, 1942, affirmed said order. *People ex rel. Palmer v. Central Mutual Insurance Co. of Chicago*, 313 Ill. App. 84.

By further order of the Illinois Court, on February 5, 1941, Assessment Roll No. 9 was ordered spread on record, levying an assessment against the policyholders therein named, including the Respondent corporation. The entry in question was as follows:

> Name of Policyholder: Charles J. Rogers, Inc.
> Number of Policy: X-114715
> Amount of Assessment: $6,116.16 (8-9).

Demand for payment of this assessment was addressed by Petitioner to the Respondent Corporation on April 11, 1941, and subsequently and the present action was instituted in the Circuit Court for Wayne County, Michigan, after payment was refused (6), on June 17, 1943. The cause was duly matured and came on for hearing, upon Petitioner's Motion for Summary Judgment, on April 14, 1944. Petitioner declared and relied upon a certified transcript of said assessment order of March 19, 1940, and upon said Assessment Roll No. 9. Respondent did not plead the Michigan Statute of Limitations. The only defense asserted was a clause in the Michigan Mutual Insurance Code, Sec-

tion 12660 Compiled Laws of Michigan, 1929, reading as follows:

> "If at any time the admitted assets are less than the reserve and other liabilities, the Company shall immediately collect upon policies with a contingent premium a sufficient proportionate part thereof to restore such assets, *provided no member shall be liable for any part of such contingent premium in excess of the amount demanded within one* (1) *year after the termination of the policy.*" (Emphasis added.)

In Petitioner's behalf it was argued that this statute did not apply to foreign insurance companies in liquidation and that it could not constitutionally be made to apply to them—that a construction of the Michigan statute with which it was admittedly impossible to comply was so arbitrary and unreasonable as to amount to a taking of property without due process of law and an impairment of the obligation of contract; also, that Petitioner was not demanding an assessment but was suing upon a valid Illinois judgment which was entitled to Full Faith and Credit under Article IV, Section 1 of the Federal Constitution; and that Petitioner was entitled to sue thereon at any time within ten years either under the Illinois statute of limitations (Revised Statutes of Ill. State Bar Assn. Ed. 1937 Ch. 83, Sec. 17) or under the Michigan Statute of Limitations (Sec. 13976(1) Compiled Laws of 1929).

The trial court upheld Petitioner's contentions and entered judgment in his favor on June 14, 1944, in the amount of $7,084.52 plus costs. On appeal to the Supreme Court of Michigan, where the same constitutional arguments were re-asserted, the judgment was vacated, without a new trial, on the ground that the action could not be maintained because demand for payment of the assessment was not made upon the Respondent corporation within one year after

the expiration of the policy. The Court held the Full Faith and Credit clause inapplicable and declared that "The rule of comity is not allowed to operate when it will contravene the rights of a citizen of the State where the action is brought." The Court's opinion is reported in 311 Mich. 416 and in 18 N.W. (2nd) 877.

II.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under the Act of February 13, 1925, c. 299, Sec. 1, 43 Stat. 937, Sec. 344 U.S.C. and Supreme Court Rule 38.

Petitioner is advised by counsel and believes that the judgment of the Supreme Court of Michigan violates Petitioner's Constitutional rights in the following respects:

> (a) It involves a refusal to accord full faith and credit to the public acts, records and judicial proceedings of the State of Illinois, contrary to Article IV, Section 1 of the Constitution of the United States, and the implementing Act of May 26, 1790, c. 11, 28 U.S.C. 687.
>
> (b) It involves an impairment of the obligation of contract contrary to Article I, Section 10 of the Constitution of the United States.
>
> (c) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

These Constitutional arguments were seasonably and repeatedly asserted in the courts below. In a brief filed in the trial court, counsel for Petitioner argued that:

> "Central Mutual Insurance Company of Chicago was organized under Illinois law and we contend

> that not only comity but the Full Faith and Credit clause of the Federal Constitution require that the judgment of the Illinois court above referred to be given the same effect in this State as it would have in Illinois," citing *Modern Woodmen of America v. Mixer*, 267 U. S. 544; *Royal Arcanum v. Green*, 237 U. S. 531, and *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U. S. 66.

The trial court, observing the judicial tradition that Constitutional issues will be determined only when necessary to a decision, treated the question as one of Conflict of Laws and for the reasons stated in his opinion (14-17) applied the law of Illinois. He cited, *inter alia*, the decisions of this Court referred to in the preceding paragraph.

In the Supreme Court of Michigan, Petitioner's rights under the Full Faith and Credit clause were asserted in the required Statement of Questions Involved (20) and were elaborately briefed.

This Constitutional question was ignored by opposing counsel, and was lightly, not to say casually, touched upon by the Court in its opinion (26). On motion for rehearing, Petitioner vigorously re-asserted the denial of Full Faith and Credit (29-32) and added that the judgment of the Court had impaired the obligation of the contract and had deprived Petitioner of a valuable property right without due process of law. All these contentions were rejected by the Court without opinion (33). Oral argument of the Constitutional questions, though specifically requested (32), was denied despite the Michigan statute providing that "Parties to proceedings pending in the Supreme Court shall be entitled to oral hearing in all calendar causes and upon all motions involving constitutional questions and personal liberty." C. L. 1929, Sec. 13531.

In these circumstances, Petitioner requests review under the Federal statute above cited which reads, in part, as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question * * * the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

The decisions of this Court which are believed to sustain jurisdiction to review the ruling of the Supreme Court of Michigan are as follows:

Hampton v. McConnell (1818), 3 Wheat 234;

Christmas v. Russell (1866), 5 Wall 290;

Bernheimer v. Converse (1906), 206 U.S. 516;

Fauntleroy v. Lum (1910), 210 U.S. 230;

Converse v. Hamilton (1911), 224 U.S. 243;

Selig v. Hamilton (1913), 234 U.S. 652;

Marin v. Augedahl (1917), 247 U.S. 142;

Kenney v. Supreme Lodge (1919), 252 U.S. 411;

Aetna Life Ins. Co. v. Dunken (1924), 266 U.S. 389;

Modern Woodmen of America v. Mixer (1925), 267 U.S. 544;

Roche v. McDonald (1927), 275 U.S. 449;

Broderick v. Rosner (1935), 294 U.S. 629;

Milwaukee County v. White Company (1935), 296 U.S. 268;

Chandler v. Peketz (1936), 297 U.S. 609;

John Hancock Mutual Life Ins. Co. v. Yates (1936), 299 U.S. 178;

Christopher v. Brusselback (1937), 302 U.S. 500;

Davis v. Davis (1938), 305 U.S. 32;

Sovereign Camp v. Bolin (1938), 305 U.S. 66;

Titus v. Wallick (1938), 306 U.S. 282;

Hansberry v. Lee (1940), 311 U.S. 32;

Milliken v. Meyer (1940), 311 U.S. 457;

Pink v. A.A.A. Highway Express, Inc. (1941), 314 U.S. 201;

Williams v. North Carolina (1942), 317 U.S. 287;

Magnolia Petroleum Co. v. Hunt (1943), 320 U.S. 430;

Williams v. North Carolina (1945), 89 Law Ed. 1123.

More specifically, Petitioner relies upon the pronouncement of this Court in *Titus v. Wallick, supra*, that

> "Where a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this court to decide."

To the same effect is *Magnolia Petroleum Co. v. Hunt, supra*, at P. 443.

III.

THE QUESTIONS PRESENTED

The questions presented are as follows:

1. May Sec. 12660 of the Compiled Laws of Michigan of 1929 be applied, without violation of the Constitutional guaranties of due process of law and against impairment of the obligation of contract, to assessments levied in judicial proceedings in Illinois for the liquidation of an insolvent Illinois mutual insurance company?

2. Does not Article IV, Section 1 of the Constitution of the United States require the Michigan courts to give Full Faith and Credit to the Illinois judgment against Respondent?

3. May the Michigan courts constitutionally treat membership in a foreign mutual insurance company as though the obligations thereby created were merely those of a Michigan contract?

4. May the State of Michigan nullify statutory obligations, consistent with morality, voluntarily assumed by citizens of Michigan as members of a mutual insurance company chartered in another state?

5. May the Michigan courts, in an action upon an Illinois judgment, disregard the Michigan statute of limitations providing that actions upon foreign judgments may be brought at any time within ten years after the rendition thereof and defeat Petitioner's recovery by substituting therefor a one year proviso of the Michigan Mutual Insurance Code, compliance with which is and has always been admittedly impossible?

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A writ of certiorari should be granted for the following reasons:

1. The decision of the Supreme Court of Michigan is in conflict with every decision of this Court construing the Full Faith and Credit clause and the implementing Act of May 26, 1790, c. 11, 28 U.S.C. 687.

2. The Respondent corporation admits membership in Central Mutual Insurance Company of Chicago. It makes no claim that the Illinois judgment is void or irregular or tainted with fraud or that the Court lacked jurisdiction to render such judgment. There would admittedly be no defense to an action on the judgment in Illinois. It is not claimed and there is not the slightest reason to suppose that the result of the proceedings in Illinois would have been any different had Respondent been personally served with process therein instead of having the corporation and other policyholders "stand in judgment for it" as permitted by the decisions of this Court. No question of the public policy of Michigan is or could legitimately be raised. The case involves a money judgment entered in a civil suit and does not involve penal obligations, revenue laws or personal status. It, therefore, does not fall within any of the few recognized exceptions to the requirement of Full Faith and Credit.

3. Although the *construction* of a Michigan statute by the Supreme Court of Michigan is final, the construction adopted in the present case, namely that it applies to foreign corporations in liquidation, is arbitrary and unreasonable in that it imposes a condition with which it is admittedly impossible to comply and involves a deprivation of Petitioner's property without due process of law in contraven-

tion of the Fourteenth Amendment and an impairment of the obligation of contract contrary to Article I, Section 10 of the Federal Constitution.

4. Under the decisions of this Court the liability in question is essentially statutory, not contractual, and the Supreme Court of Michigan was not at liberty to treat membership in Central Mutual Insurance Company of Chicago as a mere contract to be construed and enforced in accordance with the law of Michigan. Whether Petitioner relies upon the Illinois statute as a "public act" or upon Assessment Roll No. 9 confirmed by the Illinois court as a "record" or upon the assessment order of the Circuit Court of Cook County as a "judicial proceeding," the Constitution exacts Full Faith and Credit. Entry into membership in an incorporated society is more than a contract; it is entering into a complex and abiding relation and the rights and obligations of membership are governed by the law of the state of incorporation.

5. Petitioner is entitled to enforce the Illinois judgment by action thereon within ten years, under the applicable statutes either of Illinois or of Michigan, and the refusal of the Supreme Court of Michigan to apply either statute is arbitrary and unreasonable and amounts to deprivation of Petitioner's property without due process of law and an impairment of the obligation of contract.

6. Policyholders of Central Mutual Insurance Company of Chicago residing in numerous states and in the District of Columbia, have been required by the courts thereof to pay the assessments adjudged to be due Petitioner by the Illinois Court. It is unfair to the creditors of Central Mutual Insurance Company of Chicago and to the thousands of policyholders who have already paid these assessments, and it interferes with an orderly and equitable liquidation of the Company's affairs and unreasonably burdens and

obstructs interstate commerce, to permit Michigan policyholders to evade their liability.

7. The Supreme Court of Michigan has ignored the fact that Petitioner's original claim has been merged in a judgment which is entitled to Full Faith and Credit and has erroneously scrutinized Petitioner's claim as though it were being asserted for the first time. The decisions of this Court establish that in a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is *res judicata* and not open to inquiry, whatever its genesis. Moreover, the Court in reaching this indefensible result, has improperly had recourse to information *dehors* the record, namely, an insurance policy neither pleaded nor proved in the trial court, thus departing from the accepted and usual course of judicial proceedings.

8. Many of the States of the United States in which Central Mutual Insurance Company of Chicago did business have by statute imposed conditions precedent to the assessment of mutual insurance company members similar to the one-year proviso upon which Respondent relies in the case at bar. Such statutes exist in Missouri, in Ohio, in Maryland and in Kansas. In Ohio, the question in the case at bar has recently been decided by a divided Court. *Keehn, Receiver v. Hodge Drive-It-Yourself, Inc.*, 146 Ohio St. 45. Similar controversies are pending in other states. It will clarify the situation and obviate the necessity of much further litigation for this Court now to determine, with finality, the power of the States to nullify statutory obligations voluntarily assumed by their citizens as members of mutual insurance companies chartered in other states.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Michigan, to the

end that said cause may be reviewed and determined by this Court, as provided by law; that the judgment of the Supreme Court of Michigan be reversed and the judgment of the Circuit Court be reinstated; and that Petitioner may have such other and further relief in the premises as to the Court may seem appropriate and just.

Roy D. Keehn,
As Receiver of Central Mutual Insurance Company of Chicago,

By Cleveland Thurber,
Emmett E. Eagan,
Edgar H. Ailes,
Charles F. Hough,
Ira W. Hurley,
Attorneys for Petitioner.